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TABLE OF CITATIONS

STATUTES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No:

MILLER MUSIC CORPORATION,

Petitioner,

against

CHARLES N. DANIELS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the within action, dated and entered April 23, 1959, affirming the final judgment of the United States District Court for the Southern District of New York, entered on February 28, 1959, upon the defendant's motion for summary judgment dismissing the complaint upon the merits.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Appendix I, *infra*, pp. 21-32) is reported in 158 F. Supp. 188. The judgment of the District Court was affirmed by the Court of Appeals upon the opinion below (Appendix I, *infra*, p. 34), with a dissenting opinion by Washington, Cir. J. (Appendix I, *infra*, pp. 34-37) which is reported in 265 F. 2d 925.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed (Appendix II, *infra*, p. 38) is dated and was entered on April 23, 1959. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254 (1).

Questions Presented for Review

Whether under § 24 (former § 23) of the Copyright Act of 1909:

(1) The determination of the Court of Appeals that as the statute "does not differentiate between rights which it vests in the widow and children, the executor and the next of kin," (a) the executor takes such renewal rights for himself and beneficially and not in the right of others in trust for administration on their behalf, and (b) such renewal rights of the executor "cannot be defeated by the author's prior assignment," has any legal justification.

(2) An author's executor, who had applied for and obtained the renewal in a copyrighted work of the author who, having no wife or children, had made an assignment of his renewal interest in the copyrighted work to a publisher for a valuable consideration in which assignment his

sole next of kin joined, and had then made a will which did not purport to bequeath such renewal interest and under which his residuary estate was bequeathed to certain individuals, and had died before the accrual of the right of renewal leaving no widow or children, could, in derogation of such prior assignment to the said publisher, effectuate a subsequent assignment of the renewal from the residuary legatees to another publisher.

Statute Involved

The only statutory provision involved is § 24 (former § 23) of the Copyright Act of 1909, Act of March 4, 1909, c. 320, 35 Stat. 1075, et seq., U.S.C. Title 17 (Appendix III, *infra*, pp. 39, 40).

Statement of the Case

The basis for federal jurisdiction in the District Court is the Act of June 25, 1948, c. 646, 62 Stat. 931, U.S.C. Title 28, § 1338 (a), reading as follows:

> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

The cause of action of plaintiff, a music publisher, is for the infringement by defendant, a music publisher, of the rights, title and interest of plaintiff through one Ben Black, as co-author, in the renewal copyright of a musical composition entitled "Moonlight and Roses (Bring Mem'ries Of You)" R. 2a-6a)*.

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*Record references are to pages of the Plaintiff-Appellant's Appendix below. Defendant-Appellee's Appendix contains only the opinion of the District Court, which is likewise contained in the Plaintiff-Appellant's Appendix.

Both parties moved for summary judgment (R. 25a, 26a). The District Court denied plaintiff's motion and granted defendant's motion, dismissing the complaint on the merits and for judgment on its counterclaim enjoining plaintiff from infringing defendant's alleged rights, title and interest through said Ben Black in said renewal copyright, and restraining plaintiff from making any claims with respect to the ownership of said renewal copyright (R. 39a, 40a).

The respective motions for summary judgment were based upon an agreed statement of facts and conclusions of law. Following are the material facts so stipulated (the preceding numbers indicating the respective paragraphs of the stipulation, R. 7a-25a, and "Ex." indicating the particular exhibit annexed thereto):

3—Prior to January 10, 1925, said Ben Black (referred to as "Decedent") and one Charles Neil Daniels wrote the said musical composition (referred to as "Said Composition") (R. 7a).

5—Prior to January 10, 1925, they assigned to Villa Moret, Inc., a music publisher, Said Composition and the right to secure copyright therein in its name (R. 8a).

6—In 1925, the said assignee secured United States copyright in Said Composition for the original term of 28 years (R. 8a).

8—Under date of October 3, 1946, Decedent entered into a written agreement with plaintiff (Ex. A, R. 13a-16a), under which Decedent transferred, assigned and set over to plaintiff all rights and interests whatsoever as co-author, "now or at any time or times hereafter known or in existence", in and to the renewal and extension of the United States copyright in Said Composition and other compositions, and in consideration of which plaintiff agreed

to pay certain royalties and the sum of $1,000.00 on account and in advance thereof. Decedent covenanted, undertook and agreed to make, execute and deliver any and all further instruments, documents and writings "for the purpose of perfecting and confirming" such rights and interests in plaintiff (R. 8a).

9—The said sum of $1,000.00 was paid by plaintiff to Decedent upon the signing of the said agreement (R. 9a).

10—Under date of October 14, 1946, pursuant to the said agreement, Decedent executed a separate short form instrument for recording in the Copyright Office (Ex. A-1, R. 17a), whereby "for and on behalf of himself and all other parties in interest" he transferred, assigned and set over to plaintiff "all rights and interests whatsoever, then or thereafter in existence", in the renewal and extension of the United States copyright in Said Composition. Decedent had no wife or child, and his sole next of kin were three brothers. Accordingly, for the express purpose of assuring plaintiff that, in the event of his death prior to the accrual of the renewal right without making a will, plaintiff would be certain of acquiring the renewal through his surviving next of kin, Decedent procured and delivered to plaintiff a like separate instrument of assignment from each of his three brothers to plaintiff of his renewal expectancy. Each of said assignors covenanted, undertook and agreed to make, execute and deliver any and all further instruments, documents and writings "for the purpose of perfecting and confirming" such rights and interest in plaintiff (R. 9a, Exs. A-2, A-3, A-4, R. 17a-21a).

11—The four separate instruments of assignment (referred to in paragraph 10, *supra*) were duly recorded in the Copyright Office (R. 9a).

12—Under date of June 1, 1950, Decedent executed a will in which he made provision for the discharge of the

"proper claims and charges against my estate". There was no specific bequest of the said renewal copyright in Said Composition. The residuary estate was left to certain nephews and nieces of Decedent's brothers. The will recites "I hereby declare that I am single and that I leave no issue surviving me" (App. 9a, Ex. B, R. 21a-23a).

13—On December 26, 1950, Decedent died in the State of California, leaving no widow or child. On February 13, 1951, his will was admitted to probate in the Superior Court of the State of California (R. 9a).

14—David Black, one of the brothers of Decedent, who had executed a separate assignment to plaintiff, qualified as the sole executor of the will (R. 9a, 10a).

15—On January 16, 1952, said David Black, as executor, renewed the copyright in Said Composition for the further term of 28 years from January 10, 1953 (R. 10a).

16—On March 24, 1952, final distribution of the property of the estate was decreed by the court (R. 10a).

19—Under date of May 1, 1952, defendant entered into an agreement with the aforesaid nephews and nieces of Decedent, the residuary legatees under Decedent's will, whereby they assigned to defendant "all their right, title and interest" in said renewal (R. 10a, 11a, Ex. E., R. 24a). Upon the petition of David Black, as executor, said agreement was approved by the Superior Court (R. 11a).

20—Defendant entered into an agreement for the acquisition of the interest through the co-writer, Charles Neil Daniels, in the renewal copyright in Said Composition, which interest is not at issue in this action (R. 11a).

The determination of the District Court (Opinion Appendix I, *infra*, adopted by the majority of the Court of

Appeals) is based upon the erroneous legal premise that the renewal rights which the statute "vests" in the executors are no different than those vested in the widow, children and next of kin. That is to say, they take for themselves personally and beneficially, and not in the right of others in trust for administration on their behalf. In this respect the District Court, in upholding the contention of defendant that since all the designated persons (widow, children, executors, and next of kin) "derive their interest solely and directly from the statute, the author may not, by prior assignment, deprive any of them of the rights which the statute expressly grants them", said (Appendix I, *infra*, pp. 28, 31):

> "The statute does not differentiate between rights which it vests in the widow and children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those of the other persons named therein . . . I conclude that the executor has the same rights under the statute as the widow and children or next of kin. . . . it is clear that the executor's rights are no less than that of the widow and children or next of kin. They therefore cannot be defeated by the author's prior assignment."

Reasons For Granting the Writ

A.

The Decision Has Decided A Federal Question In A Way In Conflict With Applicable Decisions Of This Court.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 63 Sup. Ct. 730, this Court stated that the sole question for determination by it was as follows (pp.

643-645, 647):

"The question itself can be stated very simply. Under § 23 of the Copyright Act of 1909, 35 Stat. 1075, as amended, a copyright in a musical composition lasts for twenty-eight years from the date of its first publication, and the author can renew the copyright, if he is still living, for a further term of twenty-eight years by filing an application for renewal within a year before the expiration of the first twenty-eight year period. Section 42 of the Act provides that a copyright 'may be assigned . . . by an instrument in writing signed by the proprietor of the copyright . . .'. Concededly, the author can assign the original copyright and, after he has secured it, the renewal copyright as well. The question is—does the Act prevent the author from assigning his interest in the renewal copyright before he has secured it?

* * * * *

"The petition for certiorari in this Court stated that the 'sole question is whether . . . an agreement to assign his renewal, made by an author in advance of the twenty-eighth year of the original term of copyright, is valid and enforceable.' Because of the obvious importance of this question of the proper construction of the Copyright Act, we brought the case here. 317 U. S. 611.

Plainly, there is only one question before us—does the Copyright Act nullify an agreement by an author, made during the original copyright term, to assign his renewal?"

With respect to the wording of the Act, this Court said (p. 647):

"No limitations are placed upon the assignability of his interest in the renewal. If we look only to what the Act says, there can be no doubt as to the

answer. But each of the parties finds support for its conclusion in the historical background of copyright legislation, and to that we must turn to discover whether Congress meant more than it said."

Then, upon examining the historical background, this Court in noting that under the Act of May 31, 1790 (1 Stat. 124), enacted by the first Congress, renewal rights were given to the author or authors, "his or their executors, administrators or assigns", said (p. 650):

> "In view of the language and history of this provision, there can be no doubt that if the present case had arisen under the Act of 1790, there would be no statutory resriction upon the assignability of the author's renewal interest. The petitioners contend, however, that such a limitation was introduced by subsequent legislation, particularly the Copyright Acts of 1831 and 1909."

This Court further noted that, under the Act of February 3, 1831 (4 Stat. 436), the renewal rights were only given to the author, and "the author's widow or children." Yet this Court said (pp. 650, 651):

> "But neither expressly nor impliedly did the Act of 1831 impose any restraints upon the right of the author himself to assign his contingent interest in the renewal."

Then coming to the present Act of March 4, 1909 (35 Stat. 1075), this Court concluded that the basic consideration of policy underlying the present Act was to give the author the right to dispose of his renewal interest separate and apart from the original copyright saying (pp. 653-654):

> "By providing for two copyright terms, each of relatively short duration, Congress enabled the author to sell his 'copyright' without losing his renewal

interest. If the author's copyright extended over a single, longer term, his sale of the 'copyright' would terminate his entire interest. That this is the basic consideration of policy underlying the renewal provision of the Copyright Act of 1909 clearly appears from the report of the House committee which submitted the legislation (the Senate committee adopted the report of the House committee, see Sen. Rep. 1108, 60th Cong., 2d Sess.)."

This Court determined that neither the langauge nor the history of the present Act evidences any intention of Congress to restrict the author, in the absence of a widow and children, from assigning his renewal interest, saying (pp. 655-657):

"If Congress, speaking through its responsible members, had any intention of altering what theretofore had not been questioned, namely, that there were no statutory restraints upon the assignment by authors of their renewal rights, it is almost certain that such purpose would have been manifested. The legislative materials reveal no such intention.

We agree with the court below, therefore, that neither the langauge nor the history of the Copyright Act of 1909 lend support to the conclusion that the 'existing law' prior to 1909, under which authors were free to assign their renewal interests if they were so disposed, was intended to be altered. We agree, also, that there are no compelling considerations of policy which could justify reading into the Act a construction so at variance with its history.

* * *

We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests."

The theory of the Court below that, as an executor derives his interest solely and directly from the statute and that as the statute "vests" the same rights in him as in the other named persons, the executor takes personally and beneficially rather than in a representative capacity, has been refuted by this Court.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra,* this Court, in noting that the report of the House Committee (H. Rep. 2222, 60th Cong., 2d Sess., pp. 14-15) adopted by the Senate Committee (Sen. Rep. 1108, 60th Cong. 2d Sess.) specifically expressed the intention of § 24 (former § 23) "to permit the author who had no wife or children to bequeath by will the right to apply for the renewal", said (p. 655):

> "The report cannot be tortured, by reading it without regard to the circumstances in which it was written, into an expression of a legislative purpose to nullify agreements by authors to assign their renewal interests."

Accordingly, the executor's right of renewal is not derived solely and directly from the statute, independent of any right of his testator, personally and beneficially as in the case of a widow or child. On the contrary, in representing the person of his testator he takes only in a representative capacity, to effectuate the disposition of his testator's renewal interest whether by assignment or bequest.

In *De Sylva* v. *Ballentine,* 351 U. S. 570, 574, 76 Sup. Ct. 974, this Court said that, in the absence of a widow, widower or children, an author can effectuate a binding assignment of his renewal expectancy through his executor:

> "It is clear, however, that the executors do not succeed to the renewal interest unless *all* of the named persons are dead, since from the preceding clause it is at least made explicit that the 'widow, widower, or

children of the author' all come before the executors, after the author's death.

* * *

"This Court has already traced the development of the renewal term in the several copyright statutes enacted in this country. See *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U. S. 643, where it was held that the author, during his lifetime, could make a binding assignment of the expectancy in his future rights of renewal."

In *Fox Film Corporation* v. *Knowles,* 261 U. S. 326, 43 Sup. Ct. 365, the precise issue was for determination. This Court reversed the decree in 279 Fed. 1018 (Cir. 2), which decree had affirmed the decrees of the District Court in two cases, 274 Fed. 731 (E.D.N.Y.) and 275 Fed. 582 (S.D.N.Y.).

In each of the cases between the same parties and involving the same questions of fact and law, the defendant's motion to dismiss the complaint had been granted. The decedent, Will Carleton, had died in 1912. As in the instant case, this was prior to the renewal period, no widow or child survived him, he left a will, and the executor had applied for the renewal during the subsequent renewal period.

The District Court, in 274 Fed. 731, had dismissed the complaint upon the ground (pp. 733, 734):

"It is apparent that in 1915 the decedent, Will Carleton, had no power to make any disposition with respect to the copyright then in existence. * * * He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived."

The determination of the District Court, in 275 Fed. 582, was to the same effect.

In 279 Fed. 1018, the Court of Appeals, Second Circuit, affirmed the decrees of both District Courts, on the authority of its prior determination in *Silverman* v. *Sunrise Pictures Corporation,* 273 Fed. 909, cer. den. 262 U. S. 758, 43 Sup. Ct. 705. In that case the Court, while recognizing that there was no distinction under the statute between an assignment or devise by the author of his renewal interest, held that as the author had died before the statutory year neither his assignment nor devise of such interest could be effective, saying (p. 913):

> "But what may be assigned can ordinarily be devised, and it results that before the statutory year the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly the testatrix had as yet nothing to leave. If, however, the author lives to within the statutory year, he may certainly exercise his right to assign it, or bequeath it; and if he dies in the year, but before the registration, it is for his executors to function."

This Court in *Fox Film Corporation* v. *Knowles, supra,* in reversing the decree of the Court of Appeals, expressly held that if there is no widow or child the executor represents "the person of his testator," in acquiring and administrating the renewal rights, saying (pp. 329, 330):

> "The limitation is derived from a theory that the statute cannot have intended the executor to take unless he took what the testator already had. We should not have derived that notion from the section, which seems to us to have the broad intent that we have expressed, and the words specially applicable seem to us plainly to import that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive. The executor represents the person of his testator, Littleton,

§ 237, and it is no novelty for him to be given rights that the testator could not have exercised while he lived."

In *Brewster* v. *Gage*, 280 U .S. 327, 334, 50 Sup. Ct. 115, this Court said to the same effect:

> "Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue."

In *Silverman* v. *Sunrise Pictures Corporation, supra* (273 Fed. 909), the Court of Appeals, Second Circuit, recognized as aforesaid that there was no distinction under the statute between an assignment and a devise by an author of his renewal interest.

In *Gibram* v. *Alfred A. Knopf, Incorporated*, 153 F. Supp. 854, 859, 860 (D. C., N. Y.), affd. 255 F. 2d 121 (Cir. 2), cer. den. 358 U. S. 829, 49 Sup. Ct. 47, the District Court said:

> "Who is entitled to the benefits of the renewed copyright—the sister as the sole surviving next of kin of the Town of Bechari, Lebanon, under the will? Here the contention is that under the statute the sole right given to an author who is not survived by a spouse or children is a testamentary privilege simply to name an executor to apply for renewal. It is urged that once the renewal is obtained by a designated executor he holds the copyright in trust solely for the next of kin of the decedent and not for the benefit of any designated beneficiary or as part of the general estate.
>
> • • • • •

> The contended for construction would deprive an author, if he died without surviving spouse or children, of the right to dispose of renewal copyrights, contrary to congressional intent."

The Court of Appeals, Second Circuit, in affirming, said (p. 123):

> "Judge Weinfeld was plainly right in holding that the plaintiffs had the power and indeed the duty to renew the copyrights and to hold them for the benefit of the testator's 'home town'."

Accordingly, in *Silverman* v. *Sunrise Pictures Corporation, supra,* the same Court of Appeals recognized that there was no distinction under the statute between an assignment and a devise, and in *Gibram* v. *Alfred A. Knopf, Incorporated, supra,* it held that the executor renewed the copyrights for "the benefit of" the devisee under the testator's will. Yet in the instant case the same Court held that the author's assignment was ineffective under the statute, because the executor acquired the renewal personally and beneficially rather than in a representative capacity for the benefit of the author's assignee.

As Judge Washington said in his dissenting opinion in the instant case (Appendix I, p. 36):

> "As we have noted, the statute includes the 'author's executors' in the class of persons entitled to apply for renewal and extension of a copyright. But this cannot mean that Congress intended the executor to take personally and beneficially, as in the case of a widow and child. 'The executor represents the person of his testator * * *' Fox Film Corp. v. Knowles, 261 U. S. at 330. Therefore, he clearly is to take only in a representative and official capacity in order to prevent the copyright from lapsing and to effectuate any bequest of the renewal right which the testator was

entitled to make. See id. at 329. For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath those rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs. In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—a contract which was clearly 'valid and enforceable' under the Fisher case.

In contrast, the opinion below, adopted by the majority of this court permits an injustice to be perpetrated. It also reinforces an anomaly within the present statutory scheme. Because an executor cannot take office until the author dies, he is the only interested person who cannot join in a prior assignment of renewal rights by the author, and hence—under the reasoning of the opinion below—the only person who can absolutely defeat the rights of the prior assignee. Such is the result in the present case. But it seems highly incongruous and illogical to place the executor, and the people who take under the will, in a position preferred to that of the author's widow and children. Surely this could never have been the result Congress intended. See De Sylva v. Ballantine, supra, at 582; Shapiro, Bernstein & Co. v. Bryan, supra at 700."

The only limitation under Section 24, upon the author's power to dispose of his renewal interests, is for the protection of his widow and children, if any, in the form of a compulsory bequest to them.

As the Court of Appeals, Second Circuit, said in *Shapiro, Bernstein & Co. Inc.* v. *Bryan*, 123 F. 2d 697, 700, referring to the pertinent proviso of Section 24, "The limitation which the second proviso imposes upon the author's power to dispose of the right of renewal during his life" was

"clearly intended to protect widows and children from the supposed improvidence of authors in the colloquial sense."

In *De Sylva* v. *Ballentine, supra* (p. 582), this Court said to the same effect:

> "The evident purpose of § 24 is to provide for the family of the author after his death. Since the author cannot assign his family's renewal rights, § 24 takes the form of a compulsory bequest of the copyright to the designated persons."

If the author had not executed a will, having died leaving no widow or children, the plaintiff would have acquired the renewal under the assignment from the author's sole next of kin.

Having left a will the author, who had no wife or children, thereby bequeathed by will the right of the executor to apply for the renewal and effectuate the author's assignment to plaintiff. (*Fred Fisher Music Co.* v. *M. Witmark & Sons, supra,* p. 655). The author having made no specific bequest of the renewal rights, must he not have assumed that his executor would honor his assignment, as he would any other obligation of the testator? As Judge Washington said in his dissenting opinion (Appendix I, *infra,* p. 34):

> "In the present case, the will did not purport to bequeath the renewal rights. It was silent as to them. For all we know, the testator may have assumed that his prior assignment would be honored by his executor. But the reasoning of the opinion below extends to a silent will as well as to one in outright derogation of a previous assignment. I think in both cases the assignment should prevail."

B.

The Decision Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The District Court said "there seems to be no reported cases which specifically pass on the question and it appears to be one of first impression" (Appendix I, *infra*, p. 22).

Judge Washington, in his dissenting opinion said (Appendix I, *infra*, p. 34):

> "In his opinion below, Judge Bryan recognizes that it may be 'incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment * * *' 158 F. Supp. 188, 194 (S.D.N.Y., 1957). In my view, such a result is not only incongruous but without legal justification."

Under the construction of the Court below an author having no wife or child could assign his renewal expectancy to one publisher for a consideration and then, through the devise of a will, effectuate a second assignment either by a direct bequest, or, as in the instant case through residuary legatees, to another publisher. In the light of this construction no publisher would contract with an author for his renewal expectancy.

As this Court said in *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra* (p. 657):

> "If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell."

As Judge Washington pointed out, *supra*, the Court below, while recognizing that it may be "incongruous to

allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment," nevertheless has accepted a construction that produces just such an incongruous result.

This Court said in *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282, 288, 77 Sup. Ct. 330, referring to its prior determination in *Mastro Plastics Corp.* v. *Labor Relations Board*, 350 U. S. 270, 286, 76 Sup. Ct. 349:

> "Moreover, in Mastro Plastics we cautioned against accepting a construction that 'would produce incongruous results.' Id. at 286."

The author of this petition, Julian T. Abeles, is general counsel for the Music Publishers' Protective Association, Inc., the membership of which comprises most of the leading music publishers in the United States, and is attorney for members of said association. He is likewise general counsel for one Harry Fox, as the agent and trustee for over 600 music publishers, in the licensing of rights to their copyrighted musical works. By reason of his representation of such interests, he knows of his own knowledge that assignments of renewal interests by authors, in the same category as the assignment in the instant case and representing a substantial number of all renewal assignments, have been entered into in good faith by the authors and music publishers upon the assumption that they were valid and enforceable.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra* (pp. 658, 659), this Court in noting that there had been "no significant change" in the number of "assignments of renewals" recorded in the Copyright Office since the 1909 enactment of the present Act, said:

> "Many assignments have thus been entered into in good faith upon the assumption that they were valid and enforceable.
>
> * * * * *

"The available evidence indicates, therefore, that renewal interests of authors have been regarded as assignable both before and after the Copyright Act of 1909."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, July 15, 1959.

HAROLD H. CORBIN,
Attorney for Petitioner.

JULIAN T. ABELES,
Of Counsel.

APPENDIX I.

Opinion of the United States District Court, Southern District of New York, Upon Which the Judgment Was Affirmed by the United States Court of Appeals, Second Circuit.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MILLER MUSIC CORPORATION,

Plaintiff,

against

CHARLES N. DANIELS, INC.,

Defendant.

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OPINION

BRYAN, District Judge:

This is an action for copyright infringement by one music publisher against another. Plaintiff claims to be

the owner of a partial interest in the renewal copyright of the song "Moonlight and Roses," and seeks the enforcement of its rights as such owner. Defendant alleges that it is the owner of the entire copyright, including the partial interest claimed by plaintiff, and counterclaims for enforcement of its rights.

A United States copyright is valid for twenty-eight years from the date of first publication. 17 U.S.C. § 24. During the last year of the original twenty-eight year term an application for renewal for an additional twenty-eight years may be made under 17 U.S.C. § 24 by "the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin • • •."

The question presented here is whether the assignment of his renewal rights by Ben Black, one of the co-authors of the song, to plaintiff prior to the time when they accrued at the commencement of the last year of the original term of the copyright was defeated by the author's death before the period within which renewal could be commenced. There seem to be no reported cases which specifically pass on this question and it appears to be one of first impression.

In Fred Fisher Music Co. v. M. Witmark & Sons, 318 U. S. 643, the Supreme Court had before it for the first time the question of whether under the Copyright Act of 1909 an author may validly assign his renewal rights to a copyright prior to the time he actually acquires or may acquire them during the last year of the original copyright term. The court held that such an assignment was valid and binding as against the author or his subsequent assignees if the author survives until the twenty-eighth year of the original copyright term, the year in which his

renewal rights accrued. However, since the author was still alive at the time the renewal period commenced, *Fisher* left open the question presented here of whether such an assignment by the author could defeat the statutory right to renew which is expressly given to his widow and children, executor or next of kin by 17 U.S.C. § 24 if the author dies before the commencement of the twenty-eighth year of the original term.

The facts have been stipulated, and are as follows:

"Moonlight and Roses" was written by Ben Black and Charles N. Daniels some time prior to 1925. The authors assigned the composition and the right to secure a copyright therein to Villa Moret, Inc., a music publisher, and the latter obtained a copyright on January 10, 1925. This copyright expired on January 9, 1953.

On October 3, 1946 Ben Black assigned his partial interest in the renewal copyright to the plaintiff, Miller Music Corporation. The instrument of assignment did not by express language purport to bind Black's testamentary representatives. The assignment included a power of attorney under which the plaintiff was authorized to file a renewal application in Ben Black's name. On October 14, 1946 the plaintiff obtained separate assignments from David, Jules and Isidore Black, brothers of Ben Black, of any respective interests which they might have in the renewal copyright. All the assignments contained covenants by the assignors to make and execute any and all further instruments, documents and writings for the purpose of perfecting and confirming all rights and interests in the renewal copyright in the plaintiff. Each was duly recorded in the Copyright Office on October 27, 1946.

Ben Black died, a resident of California, on December 26, 1950, before the commencement of the last year of the original copyright term when the right to apply for renewal first accrued. He left no surviving widow or chil-

dren. In his will he names his brother David Black, and the Bank of America, as co-executors. The Bank failed to qualify and David Black became the sole executor.

The will, which was admitted to probate in the Superior Court of the State of California on February 15, 1951, made no mention of the renewal copyright or of the 1946 assignment to plaintiff. The residuary estate was left to the testator's nephews and nieces, the children of various of his brothers.

On January 16, 1952, during the last year of the original copyright term, David Black, as executor of the estate of Ben Black, applied to the Copyright Office for the renewal of the copyright in "Moonlight and Roses" and received a certificate of renewal registration from the Register of Copyrights.

On March 24, 1952 the California Superior Court issued a decree ordering the distribution of all the property in the estate. The decree specified that all the rights in "Moonlight and Roses" were included in the distribution to the nephews and nieces as residuary legatees. The latter assigned all their right, title and interest in the composition to the defendant by written assignment dated May 1, 1952. Upon petition of David Black as executor the assignment was approved by the Superior Court of California on June 23, 1952. Subsequently, a copy of the assignment, signed by David Black as executor, as well as by the assigning nephews and nieces, was filed with the Copyright Office.

The defendant has also acquired the renewal rights of the co-author, Charles N. Daniels, through an assignment from Daniels' children. There is no question as to the ownership of the Charles N. Daniels interest. The only dispute is as to who owns the Ben Black interest.

Plaintiff, asserting its partial ownership, demands that defendant be enjoined from infringing its rights under the

copyright renewal; that defendant be compelled to assign to the plaintiff all the right, title and interest of author Ben Black which it claims; and that defendant be required to pay such damages as plaintiff has sustained and to account for all gains and profits derived by such infringement. Defendant counterclaims for substantially the same relief and demands, in addition, that plaintiff be required to deliver up for destruction all infringing copies and all plates, moulds and other matter used for making such infringing copies. Both sides have moved for summary judgment on the stipulated facts. The only question presented is one of law as to the enforceability of the respective assignments under these circumstances.

Defendant's first contention is that the decree of final distribution by the California probate court is conclusive as to the ownership of the renewal copyright. This contention may be disposed of briefly. Section 1021 of the Probate Code of California provides:

> "§ 1021. *Decree of distribution.* In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, of any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees."

The California courts have consistently held that one who claims as a stranger to the estate or adversely to the estate rather than as an heir, devisee or legatee, will not be bound by a decree of distribution since the jurisdiction of the probate court is limited to rights granted in privity with the estate and does not extend to the rights or titles of adverse claimants. Estate of King, 199 Cal. 113; Estate of Cropper, 83 Cal. App. (2d) 105; Estate of Kurt, 83 Cal. App. (2d) 681.

Plaintiff's claim is based on an assignment executed during the author's lifetime. As such, the claim is one adverse to the estate under the California cases just cited. Plaintiff does not claim as an heir, devisee or legatee and the California probate decree does not constitute a binding adjudication of its rights.

Determination of rights of the parties here must rest on the effect to be given to Section 24 of the Copyright Act. The language of that section makes no reference to an assignment by an author of renewal rights which might accrue in the future. Until the Supreme Court resolved the question in Fred Fisher Music Co. v. M. Witmark & Sons, *supra,* it was far from clear that the author could, prior to the last year of the original term, make any valid assignment at all of his renewal rights. But even though the validity of such assignments, if the author remains alive, has been established, it remains to be determined whether an assignee acquires a vested interest in the renewal rights or merely an interest contingent on the author's survival until commencement of the twenty-eighth year of the original term when his renewal rights first accrue.

The statute provides that if the author is not alive during the last year of the original term, designated persons, viz., the widow and children, executor, or next of kin, in the order named, may apply for renewal in the author's stead. Defendant contends that since the designated persons, including the executor, derive their interest solely and directly from the statute, the author may not, by prior assignment, deprive any of them of the rights which the statute expressly grants them.

The rights granted by the successive Copyright Acts passed by Congress, including the presently subsisting Act of 1909, are created solely and entirely by the statute and have no existence apart from the statute. See White-Smith Music Pub. Co. v. Goff, 1 Cir., 187 Fed. 247, 248.

Thus the right of renewal or extension after the expiration of the original term derives solely from the statute and does not exist independently of it. Ever since the enactment of the Act of February 3, 1831, C. 16, 4 Stat. 436, 439, there was, with respect to renewals or extensions (White-Smith Music Pub. Co. v. Goff, *supra*, at p. 250):

> "* * * an entirely new policy, completely dissevering the title, breaking up the continuance in a proper sense of the word, whatever terms might be used, and vesting an absolutely new title eo nomine in the persons designated."

This method persists in the present act which *eo nomine* designates the persons who may apply for a renewal as the author if living at commencement of the last year of the original term, or, if he is not living his widow and children, his executor or his next of kin successively.

The courts have frequently stated that prior to the last year of the original term the author has merely an expectancy in the renewal term. De Sylva v. Ballentine, 351 U. S. 570, 574; Rossiter v. Vogel, 2 Cir., 134 F. 2d 908, 910; Carmichael v. Mills Music, Inc., D.C.S.D.N.Y., 121 F. Supp. 43, 45. In the light of the policy of the act with respect to renewal rights "expectancy" means that any right to renewal which the author may have is entirely contingent upon the author's survival until the commencement of the twenty-eighth year Since this be so an author's assignment of his renewal rights *in futuro* can effectively transfer such rights to the assignee only if the author survives until the commencement of the twenty-eighth, or last, year of the original term. If the author survives he becomes vested with an absolute power to renew under the statute, and the prior contingent assignment in turn vests such renewal rights in the assignee. On the other hand, if the author fails to survive he has never become vested with

any rights of renewal, such rights by statute have been vested *eo nomine* in his widow, children, executor or next of kin, as the case may be, and there is nothing which can pass by virtue of the assignment.

Plaintiff concedes that when an author fails to survive until the commencement of the last year of the original term, any prior assignment by him is void as against the widow, children and next of kin. But it contends that this is not true as to the executor, because an executor stands in the shoes of his testator and is bound to carry out any agreements entered into by the testator during his lifetime. I cannot agree with this contention. The statute does not differentiate between rights which it vests in the widow and children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those of the other persons named therein. The executor's right to renew in the event that neither the author nor his widow and children survive at the commencement of the renewal period is not a derivative right arising under general testamentary law. It is rather a right arising from the statute itself which has created the right in its own express and limited terms. Since, as has been pointed out, no such right exists apart from the statute, the right cannot be taken away unless the statute expressly so provides. This Congress has not seen fit to do.

Under the scheme of the statute the right of renewal does not follow the ordinary rules of succession. It may be noted, for example, that the widow and children are entitled to renew even though there be a will in which an executor has been designated. Moreover, while the executor may renew if there be no widow or children, there is no mention whatever of an administrator should the author die intestate. In such case, absent widow and children, the renewal right is vested in the next of kin directly. This

statutory scheme, in derogation of the ordinary law of succession is a further indication that the right of renewal does not belong to the author's estate by right of succession, but belongs only to the appropriate person designated in the statute, in this case the executor, who would in turn be obligated to apply for the renewal and distribute the rights so acquired in accordance with the terms of the will.

In Danks v. Gordon, 2 Cir. 272 Fed. 821, an administrator brought an action for infringement of a copyright renewal. The court held that the action was really one for unpaid royalties, and that an administrator has no standing to sue for infringement of a copyright renewal since he is not one of the persons entitled to renew under the statute. The action was dismissed for want of jurisdiction. The court stated at p. 825:

> "* * * It will be noticed that while an executor is mentioned an administrator is not and therefore has been regarded as excluded. White-Smith Music Publishing Co. v. Goff (C.C.), 180 Fed. 256, 258. The right of renewal does not follow the author's estate but the renewal right is derived directly from the statute."

In Fox Film Corp. v. Knowles, 261 U.S. 326, the author died prior to the commencement of the last year of the original copyright term, leaving no surviving widow or children, and his executor subsequently applied for the renewal copyright. The question presented there was whether an executor could, through renewal, obtain rights which his testator never possessed during his lifetime, or whether the executor's right to apply for renewal was limited to the rare situation where the author died during the last year of the original copyright term without having made the necessary application for renewal himself. In holding that the executor's rights are the same as those of the other persons named in the statute, and that the

executor's right to renew is independent of the author's rights at the time of his decease, Mr. Justice Holmes stated (261 U.S. at 329-330):

> "• • • No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had. The limitation is derived from a theory that the statute cannot have intended the executor to take unless he took what the testator already had. We should not have derived that notion from the section • • •."

In Fred Fisher Music Co. v. M. Witmark & Sons, *supra*, the Supreme Court, in holding that an assignment of an author's renewal right was valid if the author survived until such right became vested in him, refers to the author's "*contingent* interest in the renewal" under the 1831 Act prior to the commencement of the period when he could, if living, apply for renewal. (318 U. S. at p. 651.)

In the opinion of the Court of Appeals for this Circuit below in the *Fisher* case, 125 F. 2d 949, the court discussed the effect of the death of an author who had assigned his renewal interest prior to the vesting of his right to renewal and said by way of *dictum* (p. 950):

> "• • •It is also apparent that the assignment here would not have cut off the rights of renewal extended to the widow, children, executors, or next of kin, in the event of Graff's death prior to the renewal period. • • •"

Applying the reasoning of Mr. Justice Holmes in the *Fox Film* case and of the *dictum* of the Court of Appeals of

this Circuit in *Fisher* to the facts before me, I conclude that the executor has the same rights under the statute as the widow and children or next of kin. His right to renew is completely independent of what the author's rights were at the time of his decease. The fact that the author had assigend his inchoate renewal rights to the plaintiff would not have barred his widow, or children, if any, from exercising their statutory renewal rights. See De Sylva v. Ballentine, 351 U. S. 570, 582; Silverman v. Sunrise Pictures Corp., 2 Cir., 273 Fed. 909, 913; Shapiro, Bernstein & Co. v. Bryan, 2 Cir., 123 F. 2d 697, 700. Under the *Fox Film* and *Fisher* cases it is clear that the executor's rights are no less than that of the widow and children or next of kin. They therefore cannot be defeated by the author's prior assignment.[1]

If it be argued that it is incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment, the remedy lies with Congress which passed the statute, and not with the courts. For there is nothing in the language used by Congress which permits a contrary conclusion. The basic purpose of these provisions of the copyright statutes since the Act of 1931 is to give the reward to the author rather than the bookseller. Register of Debates, Vol. 7, Appendix CXIX. The report of the House Committee regarding Section 23 of the Act

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[1] There has been some disagreement among the text writers as to the effect of an assignment by the author upon the executor's subsequent right to renew under the statute. The following writers seem to be of the view that the author assigns only his expectancy, and that his death before the twenty-eighth year of the first term renders any previous assignment of the expectancy invalid; Ball, Law of Copyright and Literary Property (1944) 555-56; Spring, Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising and The Theater (2nd ed., revised) 95; Ladas, International Protection of Literary and Artistic Property (1938) 772-73. For the contrary view, see Drone on Copyright (1879) 327; Shafter, Musical Copyright (2d ed. 1939) 177.

of 1909 (now Section 24) makes it plain that this was also the purpose of that section. H. Rep. 2222, 60th Cong., 2d Sess. pp. 14-15. Indeed, with respect to the renewal rights vested in the executor by the section the Committee stated:

> "* * * Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal."

The contingent interest in the renewal assigned to the plaintiff therefore never vested and was terminated by the death of the author. The renewal right then vested in the executor who could apply for and obtain a renewal which passed to the residuary legatees. They in turn could and did validly assign such rights to the defendant.

Plaintiff's motion for summary judgment is therefore denied and defendant's motion for summary judgment is granted.

However, the relief which defendant seeks by way of damages, an accounting, attorney's fees and the impounding and destruction of infringing copies, plates and moulds will require further proceedings. The order to be entered on these motions will make provision for such further proceedings as may be necessary.

Settle order on 10 days' notice.

Dated: New York, N. Y., December 31, 1957.

FREDERICK V. P. BRYAN,
U. S. D. J.

APPENDIX I.

Dissenting Opinion by Washington, Cir. J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 165—October Term, 1958.

(Argued March 9, 1959 Decided April 23, 1959.)

Docket No. 25339

MILLER MUSIC CORPORATION,
Plaintiff-Appellant,

—v.—

CHARLES N. DANIELS, INC.,
Defendant-Appellee.

Before:

WASHINGTON, WATERMAN and MOORE,
Circuit Judges.

Action for copyright infringement. Appellant and appellee each moved for summary judgment below. The defendant's motion having been granted, Southern District of New York, Bryan, *J.*, the plaintiff appeals. Affirmed.

ABELES & BERNSTEIN (Julian T. Abeles, of counsel), New York City, *for Plaintiff-Appellant.*

LEWIS A. DREYER and JACK M. GINSBERG (Lewis A. Dreyer, Jack M. Ginsberg, New York City; Milton A. Rudin, Payson Wolff, Los Angeles, Calif., of counsel), *for Defendant-Appellee.*

PER CURIAM:

The judgment below is affirmed upon the written opinion of Judge Bryan, reported at 158 F. Supp. 188.

WASHINGTON, *Circuit Judge* (dissenting):

In his opinion below, Judge Bryan recognizes that it may be "incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment * * *" 158 F. Supp. 188, 194 (S. D. N. Y. 1957). In my view, such a result is not only incongruous but without legal justification. In the present case, the will did not purport to bequeath the renewal rights. It was silent as to them. For all we know, the testator may have assumed that his prior assignment would be honored by his executor. But the reasoning of the opinion below extends to a silent will as well as to one in outright derogation of a previous assignment. I think in both cases the assignment should prevail.

Under the present Act, the original term for copyright protection is twenty-eight years, with a further term of twenty-eight years upon renewal. 17 U. S. C. § 24 (1952).[1] According to the scheme of the statute, should the author

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[1] The pertinent language is:

"* * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright. * * *"

die prior to the time when the renewal rights vest in him, any assignment of those rights which he had theretofore made could not defeat the statutory right of the author's widow (or widower) and children to the copyright renewal. Cf. *De Sylva* v. *Ballentine*, 351 U. S. 570, 580 (1956). Similarly, if no widow and children survive, and the author were to leave no will, the renewal rights would vest in the next of kin. Cf. *Silverman* v. *Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), cert. denied, 262 U. S. 758 (1923). Finally, if no widow and children survive, the author nevertheless has the power to "bequeath by will the right to apply for the renewal." H. R. Rep. No. 2222, 60th Cong., 2d Sess. 15 (1909). Under such circumstances the executor is given the power to obtain the renewal. See *Fox Film Corp.* v. *Knowles*, 261 U. S. 326 (1923).

This statutory scheme was created by Congress to protect the author and his family from the author's own improvidence. *Shapiro, Bernstein & Co.* v. *Bryan*, 123 F. 2d 697, 700 (2d Cir. 1941). But even though the intent of Congress was that the renewal rights in the first instance be "exclusive" in the author, and even though the statute was therefore framed so that the author "could not be deprived of that right," H. R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909), there was certainly no intent by the Congress to set up an absolute prohibition on the power to assign the renewal rights. The author not only can assign the original copyright, see, 17 U. S. C. § 28 (1952), but also the renewal copyright as well, once the renewal right has vested in him, see *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 645 (1943). Similarly, "'an agreement to assign his renewal, made by an author in advance of the twenty-eight year of the original term of copyright, is valid and enforceable'." *Id.* at 647. Of course, it has been assumed that this broad power of assignment cannot be construed to defeat the renewal rights which vest in

the widow and children or next of kin when the author dies prior to the twenty-eighth year of the original copyright. See, e.g., *De Sylva* v. *Ballentine, supra,* at 582. But even these renewal rights may be effectively defeated in favor of an assignee if the widow, children, and next of kin all join in the prior assignment by the author. Cf. *Tobani* v. *Carl Fischer, Inc.,* 263 App. Div. 503, 33 N. Y. S. 2d 294, affirmed, 289 N. Y. 727; 46 N. E. 2d 347 (1942). There can thus be no doubt that Section 24 of the Copyright Act does not create any "drastic restriction on free assignability." *M. Witmark & Sons* v. *Fred Fisher Music Co.,* 125 F. 2d 949, 953 (2d Cir. 1942), affirmed, 318 U. S. 642 (1943). This is especially true in light of the whole "history of judicial disapproval of restraints on assignability" 125 F. 2d at 953.

As we have noted, the statute includes the "author's executors" in the class of persons entitled to apply for renewal and extension of a copyright. But this cannot mean that Congress intended the executor to take personally and beneficially, as in the case of a widow or child. "The executor represents the person of his testator * * *" *Fox Film Corp.* v. *Knowles,* 261 U. S. at 330. Therefore, he clearly is to take only in a representative and official capacity in order to prevent the copyright from lapsing and to effectuate any bequest of the renewal right which the testator was entitled to make. See *id.* at 329. For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath those rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs. In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—a contract which was clearly "valid and enforceable" under the *Fisher* case.

In contrast, the opinion below, adopted by the majority of this court, permits an injustice to be perpetrated. It also reinforces an anomaly within the present statutory scheme. Because an executor cannot take office until the author dies, he is the only interested person who cannot join in a prior assignment of renewal rights by the author, and hence—under the reasoning of the opinion below—the only person who can absolutely defeat the rights of the prior assignee. Such is the result in the present case. But it seems highly incongruous and illogical to place the executor, and the people who take under the will, in a position preferred to that of the author's widow and children. Surely this could never have been the result Congress intended. See *De Sylva* v. *Ballentine, supra,* at 582; *Shapiro, Bernstein & Co.* v. *Bryan, supra,* at 700.

APPENDIX II

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty third day of April one thousand nine hundred and fifty nine.

Present:

HON. GEORGE T. WASHINGTON
HON. STERRY R. WATERMAN
HON. LEONARD P. MOORE
Circuit Judges.

MILLER MUSIC CORPORATION,
Plaintiff-Appellant

—v.—

CHARLES N. DANIELS, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX III.

Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075 et seq., U.S.C. Title 17) § 24 (former § 23):

§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered there within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of

copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.